



Osgoode Hall Law Journal

Volume 54

Issue 2 *Volume 54, Issue 2 (Winter 2017)*

Special Issue: Introduction to the Law and Markets: Regulating Controversial Exchange
Guest Editors: Kimberly Krawiec, Poonam Puri and Mitu Gulati

Article 6

6-1-2017

Markets and Sovereignty

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Citation Information

Blocher, Joseph and Gulati, Mitu. "Markets and Sovereignty." *Osgoode Hall Law Journal* 54.2 (2017) : 465-490.

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Markets and Sovereignty

Abstract

The past few decades have witnessed the growth of an exciting debate in the legal academy about the tensions between economic pressures to commodify and philosophical commitments to the market inalienability of certain items. Sex, organs, babies, and college athletics are among the many topics that have received attention. The debates often have proceeded, however, as if they involve markets on one side and the state on the other, with the relevant question being the ways in which the latter can or should try to facilitate, restrict, or rely on the former. In this article, we approach the relationship between markets and sovereign control from a different perspective, and contemplate more radical versions of their relationship. What would it mean for governing authority itself to be market alienable? And what would it mean if the people—rather than the state—were the ones who set the prices and controlled the transfers? Could a ‘market for sovereign control’ contribute to welfare-enhancing changes in governance?

Keywords

Sovereignty—Economic aspects; Political science—Economic aspects

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Cover Page Footnote

The authors thank Amar Bhatia, James Hathaway, Kim Krawiec, Obiora Okafor, Anneke Smit, workshop participants at Osgoode Hall, and the two anonymous reviewers of this manuscript. Special thanks to Poonam Puri for organizing this symposium.

Special Issue

Markets and Sovereignty*

JOSEPH BLOCHER & MITU GULATI[†]

The past few decades have witnessed the growth of an exciting debate in the legal academy about the tensions between economic pressures to commodify and philosophical commitments to the market inalienability of certain items. Sex, organs, babies, and college athletics are among the many topics that have received attention. The debates often have proceeded, however, as if they involve markets on one side and the state on the other, with the relevant question being the ways in which the latter can or should try to facilitate, restrict, or rely on the former. In this article, we approach the relationship between markets and sovereign control from a different perspective, and contemplate more radical versions of their relationship. What would it mean for governing authority itself to be market alienable? And what would it mean if the people—rather than the state—were the ones who set the prices and controlled the transfers? Could a ‘market for sovereign control’ contribute to welfare-enhancing changes in governance?

Au cours des dernières décennies, les théoriciens du droit se sont engagés dans un débat passionnant au sujet des tiraillements qui existent entre les pressions économiques en faveur de la marchandisation et les engagements philosophiques à l'égard de l'inaliénabilité marchande de certains produits. Le sexe, les organes, les bébés et le sport collégial figurent parmi les nombreux sujets qui ont retenu l'attention. Toutefois, les débats opposent fréquemment les marchés, d'une part, et l'État, d'autre part, et s'articulent autour de la question de savoir comment l'État peut ou devrait tenter de faciliter, de restreindre ou d'exploiter les marchés. Dans cet article, nous abordons le lien entre les marchés et le contrôle souverain sous un angle différent, et nous envisageons des versions plus radicales de ce lien. Quelles seraient les conséquences si la fonction gouvernementale elle-même

* An earlier version of this article was presented at the Law & Markets: Regulating Controversial Exchange Symposium on 15 September 2015 at Osgoode Hall Law School, Toronto.

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était aliénable sur le marché? Et si c'étaient les citoyens, et non l'État, qui fixaient les prix et contrôlaient les transferts? Un « marché du contrôle souverain » pourrait-il contribuer à modifier la gouvernance en vue d'améliorer le bien-être?

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THIRTY YEARS AGO, MARGARET RADIN'S ARTICLE "Market-Inalienability"¹ helped shape the controversies that are the focus of this special issue: the proper limits on what can be sold, how, and why. The special issue articles—including Radin's own—reflect the importance of those debates and the transformations they have undergone. Some characteristics of the debates have remained consistent, however. For the most part, the debates about market inalienability and commodification² have proceeded as if they involve markets on one side and the state on the other, with the relevant questions being how and why the latter can facilitate, restrict, or rely on the former.³

We approach the relationship between markets and sovereign control from a different perspective and contemplate more radical versions of it. What would it mean for governing authority itself to be market alienable? And what would it mean if the people—rather than the state—were the ones who set the prices and controlled the transfers? Could a 'market for sovereign control' contribute to welfare-enhancing changes in governance?

1. Margaret Jane Radin, "Market-Inalienability" (1987) 100 Harv L Rev 1849.
2. Market inalienability refers to the proposition that a given item may not be traded in a market, while commodification refers to the transformation of an item into a commodity that is traded in markets.
3. See e.g. Kimberly D Krawiec, "Foreword: Show Me the Money: Making Markets in Forbidden Exchange" (2009) 72:3 Law & Contemp Probs i; Alvin E Roth, "Repugnance as a Constraint on Markets" (2007) 21:3 J Econ Persp 37 at 39-40; Philip E Tetlock, "Thinking the Unthinkable: Sacred Values and Taboo Cognitions" (2003) 7:7 Trends Cognitive Sci 320.

Similar questions have arisen in a variety of contexts, perhaps most obviously in the debates over privatization of functions formerly performed by the state.⁴ In Radin's terminology, critics of privatization tend to argue that certain state functions should be market inalienable (and perhaps inalienable altogether) because to sell them (or transfer them at all) would threaten a variety of important values, from participatory democracy to civic identity to the prevention of corruption.⁵ But by and large the privatization debate implicitly accepts the markets-versus-sovereign control paradigm.

We instead investigate the possibility of a market *for* sovereign control. In doing so, our goal is to improve the allocation and exercise of the power to govern, not to vindicate markets as such. The focus of this article is therefore on those situations in which sovereign control—the power to govern—is being used in a harmful way, and where the introduction of a market-type solution might help remedy this harm. The three scenarios we have in mind are those

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4. See Martha Minow, "Public and Private Partnerships: Accounting for the New Religion" (2003) 116:5 Harv L Rev 1229 at 1230 (stating that "a useful definition [of privatization] encompasses the range of efforts by governments to move public functions into private hands and to use market style competition"). For commentary, see generally Martha Minow, *Partners, Not Rivals: Privatization and the Public Good* (Boston: Beacon Press, 2002); Special Issue, *Symposium: Public Values in an Era of Privatization* (2003) 116:5 Harv L Rev; Special Issue, *Symposium: New Forms of Governance: Ceding Public Power to Private Actors* (2002) 49:6 UCLA L Rev; Special Issue, *Tenth Annual Symposium on Contemporary Urban Challenges - Redefining the Public Sector: Accountability and Democracy in the Era of Privatization* (2001) 28:5 Fordham Urb LJ.
 5. See Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983) at 100 (noting the various types of "blocked exchanges"—items, services, and entitlements that cannot be bought or sold); Michael J Sandel, "What Money Can't Buy: The Moral Limits of Markets" (The Tanner Lectures on Human Values delivered at Brasenose College, University of Oxford, 11-12 May 1998) (criticizing the use of market conceptions to understand areas traditionally immune from such thinking).

involving oppressive governments,⁶ refugees,⁷ and regions (or member states of an international organization) that are inflicting serious harm on their nations (or international organizations).⁸

These three issues are complicated enough standing alone, and each raises unique challenges. But they also share a common feature, which is that states' invocations of sovereignty—especially control of sovereign territory—are treated as trump cards that stand in the way of efforts to address underlying tragedies.⁹ For the purposes of our analysis, we instead treat sovereign control as a legal entitlement predicated on good governance—an entitlement that can therefore be involuntarily alienated on those grounds. Moreover, we try to construct a framework wherein the power of alienating sovereignty is not held exclusively by those who govern countries, but is shared with the people in whose name that sovereignty is exercised.¹⁰

This reconceptualization of sovereignty, rather than the invocation of a market mechanism, is—legally speaking—the most novel and radical part of our proposal, and the part with which international lawyers are most likely to disagree.

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6. See Part I, below. See also Joseph Blocher & Mitu Gulati, "A Market for Sovereign Control" (2017) 66:4 Duke LJ 797 [Blocher & Gulati, "A Market for Sovereign Control"]; Karen Knop, "A Market for Sovereignty? The Roles of Other States in Self Determination" (2017) 54:2 Osgoode Hall LJ [insert pg number once we know]; W Mark C Weidemaier, "A (Very Thin) Market for Sovereign Control" (2017) 66 Duke LJ [forthcoming]; Anna Gelpern, "Cinderella Sovereignty" (2017) Duke LJ, online: <<http://dlj.law.duke.edu/2017/01/a-very-thin-market-for-sovereign-control/>>.
 7. See Part II, below; Joseph Blocher & Mitu Gulati, "Competing for Refugees: A Market-Based Solution to a Humanitarian Crisis" (2016) 48:1 Colum HRLR 53 [Blocher & Gulati, "Competing for Refugees"]. See also E Tendayi Achiume, "The Fact of Xenophobia and the Fiction of State Sovereignty: A Reply to Blocher and Gulati" *Colum HRLR Online* [forthcoming in 2017]; Peter Schuck, "Comment on Blocher and Gulati, 'Competing for Refugees: A Market-Based Solution to a Humanitarian Crisis,'" *Colum HRLR Online* (24 January 2017), online: <www.hrlr.law.columbia.edu/category/hrlr-online/>.
 8. See Part III, below. See also Joseph Blocher & Mitu Gulati, "Forced Secessions" (2017) 80 Law & Contemp Probs, Blocher & Mitu Gulati, Forced Secessions, 80 Law and Contemporary Problems 215 (2017); Joseph Blocher, Mitu Gulati & Laurence R Helfer, "Can Greece be Expelled from the Eurozone? Toward a Default Rule on Expulsion from International Organizations" in Franklin Allen et al, eds, *Filling the Gaps in Governance: The Case of Europe* (Fiesole, Italy: European University Institute, 2016) 127.
 9. Human rights scholars have been fighting this battle for decades; their success is debatable. See generally Eric A Posner, *The Twilight of Human Rights Law* (New York: Oxford University Press, 2014).
 10. On the argument that a modern understanding of sovereignty should be located in the right of people to what one might call collective self-determination, see Margaret Moore, *A Political Theory of Territory* (New York: Oxford University Press, 2015) at 9, 50.

We believe, however, that this reconceptualization represents not only the best reading of underlying principles of international law, including such apparent irreconcilables as territorial integrity and remedial secession, but also a desirable response to some of the most serious threats to human rights and welfare.

One common legal response to those threats has been a full-frontal assault on the fortress of sovereignty. This assault has generally failed. Despite a few breaks,¹¹ the walls have held. Others have attempted a flanking maneuver by suggesting that state sovereignty is no longer as certain as it once was,¹² or that corporations and NGOs are the new sovereigns.¹³ But this response is not satisfying either. Despite the undoubted rise of other forms of pseudo-sovereign power, national borders continue to shape destinies.

Our solution is not to dissolve or diminish sovereignty, but to reclaim it. We think of *the people* as the legal ‘owners’ of sovereignty,¹⁴ and we believe that states’ exercise of sovereign control is ultimately defeasible—it can be lost or forfeited under certain circumstances.¹⁵ Moreover, we do not think of the current map of sovereign control as representing any immutable facts about the world. Rather, sovereign control (largely captured by national borders) can and sometimes should change in response to popular will. Our two moves, therefore, are to conceptualize sovereignty as resting with the people, and as being transferrable by them on a variety of terms. Our goal is not just to think critically about markets, but about sovereignty itself.

We approach these questions as legal scholars and our primary tools are law, economics, and history. But those are not the only lenses through which to view the issue of territorial sovereignty. Most notably, a small group of political theorists, including David Miller, Cara Nine, and Anna Stilz, have been asking

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11. See e.g. W Mark C Weidemaier, “Sovereign Immunity and Sovereign Debt” (2014) U Ill L Rev 67 at 69 (noting the modern default rule on foreign sovereign immunity, which is that countries engaging in cross border commercial transactions are deemed to have waived their rights against being sued in foreign courts).
 12. See e.g. Neil McCormick, *Law, State, and Nation in the European Commonwealth* (New York: Oxford University Press, 1999).
 13. See e.g. Abdul A Said & Luiz R Simmons, eds, *The New Sovereigns: Multinational Corporations as World Powers* (Englewood Cliffs, NJ: Prentice-Hall, 1975).
 14. In the United States, the reconception of sovereignty in these terms is foundational to the constitutional system.
 15. We support the right of self-determination in some circumstances, for example, and we argue that nations can essentially be forced to sell regions to which they have denied representation or equal rights. See Blocher & Gulati, “A Market for Sovereign Control,” *supra* note 6 at 819-22.

basic questions about sovereignty and territory for some time.¹⁶ International law and theory have yet to catch up, but perhaps, just as Radin's pioneering work drew on various non-legal philosophical traditions, we can help bring political theory and international law closer together.

I. BAD BORDERS AND OPPRESSIVE GOVERNMENTS¹⁷

Although well-drawn national borders are important—perhaps essential—to good governance and economic development,¹⁸ they were not all drawn with those goals in mind. Many national borders reflect nothing more than the whims of colonial administrators, the results of military conquest, or something as random as the King of X bequeathing a dowry for his daughter's marriage to the King of Y.¹⁹ Though the passage of time may have transformed some of these idiosyncracies into something like national identity,²⁰ other undesirable boundaries have been unimproved or even worsened by the passage of time. The dominant religion in a region might change, or the region might find natural resources that exacerbate underlying tensions. Whatever the cause, the result is that some regions are in the 'wrong' countries—wrong in the sense that the

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16. See *e.g.* David Miller, "Property and Territory: Locke, Kant, and Steiner" (2011) 19:1 J Pol Phil 90 (describing the individualist Lockean theory of sovereign territory associated with Hillel Steiner and others); Cara Nine, "A Lockean Theory of Territory" (2008) 56 Pol Studs 148 at 155 (defending a "collectivist Lockean theory" under which "the state acquires territorial rights in much the same way that individuals acquire property rights"); Anna Stilz, "Nations, States, and Territory" (2011) 121:3 Ethics 572 at 578 (arguing that states "have territorial rights because their jurisdiction serves the interests of their subjects").
 17. The analysis in this Part expands that of our work, "A Market for Sovereign Control," and some of the summary passages are directly reproduced. See Blocher & Gulati, "A Market for Sovereign Control," *supra* note 6.
 18. See generally Alberto Alesina & Enrico Spolaore, *The Size of Nations* (Cambridge, Mass: MIT Press, 2003) (treating national borders as a determinant of development, rather than an exogenous variable).
 19. See Anthony Farrington, "Trading Places: The East India Company and Asia" (2002) 52 Hist Today 40 at 40 (noting that Portugal gave Bombay to England as part of the dowry of Catherine of Braganza, who married Charles II).
 20. See Pierre Bourdieu, *Outline of a Theory of Practice* (Cambridge, UK: Cambridge University Press, 1977) at 164, cited in Tayyab Mahmud, "Colonial Cartographies, Postcolonial Borders, and Enduring Failures of International Law: The Unending Wars Along the Afghanistan-Pakistan Frontier" (2010) 36:1 Brook J Int'l L 1 at 48 ("Every established order tends to produce ... the naturalization of its own arbitrariness").

region's inhabitants would be better off if their region were governed by another country's government.²¹

The cost of this state of affairs is difficult to overstate. Many regions, especially those whose populations are national minorities, justly feel oppressed and ill-served by their current countries. Some regions try to secede and form their own nations. But such attempts tend to be fiercely resisted even in the most civilized countries. Other regions yearn not to govern themselves but to be part of a wholly different country. This desire is often viewed with even more disfavour. International law and practice give national boundaries a strong presumption of stability, and the mechanisms for changing them are often ill-suited to the task. As a result, undesirable borders—and therefore sovereign control—typically stay in place until they are forcibly moved by secession or the intervention of some powerful external actor. Violence, instability, and poverty are frequent byproducts.

In some cases, these conditions slip into outright oppression as nations deny their own people the political representation and equal rights that are the preconditions of legitimate sovereign control.²² In those scenarios, the traditional conception of sovereignty acts as a shield for brutality. Without doing away with sovereignty, how might those problems be avoided?

21. They might also be much better off if their existing country had a different government, of course, and the basic mechanisms of democratic change might in some circumstances allow them to choose them. When available, those mechanisms are often a better means to the welfare-enhancing ends we advocate. But for legal, political, or other reasons, that will not always be a feasible option, particularly for unpopular or oppressed minorities. In effect, we think that said inhabitants should be able to vote for existing governments in other countries. Readers who are uncomfortable with the market rhetoric here can hopefully embrace this as a radical version of popular sovereignty, with an alternative framing: "Democracy Without Borders" or "Borders in a World of Popular Sovereignty."

22. See *Reference re Secession of Quebec*, [1998] 2 SCR 217 at paras 128-35, 161 DLR (4th) 385 [*Secession Reference*]. See also *Loizidou v Turkey*, No 15318/89, [1996] VI, where Judge Wildhaber concurring, joined by Judge Ryssdal states: "In recent years a consensus has seemed to emerge that peoples may also exercise a right to self-determination if their human rights are consistently and flagrantly violated or if they are without representation at all or are massively under-represented in an undemocratic and discriminatory way. If this description is correct, then the right to self-determination is a tool which may be used to re-establish international standards of human rights and democracy" (*ibid* at 458) [*Loizidou*]; Cf Milena Sterio, "On the Right to External Self-Determination: 'Selfistans,' Secession, and the Great Powers' Rule" (2010) 19 Minn J Int'l L 137 at 137-39 (discussing criteria used by the international community to validate a group's self-determination efforts).

A. SOVEREIGNTY AS PROPERTY

One solution is to conceptualize these problems as a question of allocating a valued resource: sovereign control over territory.²³ Although the nature of the resource is unique (and that uniqueness complicates the analysis), the problem of allocating valuable resources is hardly novel. Indeed, the dominant legal solution in liberal democratic societies is deeply ingrained and well-worn: assign clear property rights, protect them, and let parties bargain their way to mutual advantage.²⁴ Creating a market for sovereign control, then, would mean assigning property rights in sovereign control and permitting them to be traded. In a well-functioning market, sovereign control and territory would largely be matched up based on supply and demand.

The initial and crucial question is *who* gets to hold the key property right—who, in other words, gets to determine the national identity of a region. We suggest that the right (and therefore the power to alienate) should be held jointly by the region's inhabitants and the state itself, with the relative strength of their entitlements depending on the degree to which the state is well-governed. Where states engage in the kind of oppressive conduct mentioned in Part I, above, they lose their right to forbid exit, and the region may transfer sovereign control over itself to another state.

Although they are neither described nor practiced in quite this way, current principles of international law could be seen to support this kind of joint control. Indeed, our goal is to derive solutions from *within* international law, not, for example, from first principles of normative political theory. Many sources of international law, including the UN Charter,²⁵ say that all peoples have a right to self-determination, which means a power—within limits—to choose

23. An alternative would be to alleviate the scarcity by creating more of the resource. This is essentially what is accomplished by “sea-steading.” Such efforts not only generate new sovereign places, but essentially create new *sovereigns*—sometimes in a corporate form. Accordingly, they raise a set of complications that is related but not identical to those discussed here. See “Seasteading: Cities on the Ocean,” *The Economist* (3 December 2011), online: <www.economist.com/node/21540395/>.

24. We are not the first to suggest the utility of analogies to private law. With special reference to international arbitration, see generally Hersch Lauterpacht, *Private Law Sources and Analogies of Law* (London: Longmans, Green and Co, 1927). See also Lauterpacht stating, “The part of international law upon which private law has engrafted itself most deeply is that relating to acquisition of sovereignty over land . . .” (*ibid* at 91). See also Paul B Stephan, “Blocher, Gulati, and Coase: Making or Buying Sovereignty?” (2017) 66 Duke LJ [forthcoming].

25. *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7.

who shall exercise sovereign control over them.²⁶ The viability of the right of self-determination is of course debatable.²⁷ But if it is to be taken seriously, then peoples who occupy a particular region—call it Kashmir, Jaffna, or Scotland—should be able to decide to put their national identity up for auction. Other states that want to take on the region could then bid in this auction, offering some combination of (a) citizenship or other valuable resources to the populace, and (b) compensation to the rump state—for example, by taking on a portion of its national debt.

One important complication here lies in defining—and justifying—what counts as a region for purposes of our proposal. This is not a problem unique to our proposal: The current right of self-determination as articulated in international conventions generally accrues to “peoples,”²⁸ and no one quite knows what those are either.²⁹ But we think that sub-national application of the principle of *uti possidetis*³⁰ can provide useful guidance in this regard. The boundaries of Scotland, Kashmir, and Catalonia are reasonably clear, at least

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26. See e.g. *International Covenant on Economic, Social, and Cultural Rights*, 16 December 1966, 999 UNTS 3 art 1 (entered into force 3 January 1976) [ICESCR]; *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 art 1 (entered into force 23 March 1976, accession by Canada 19 May 1976) [ICCPR]; *Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 e of the Charter*, GA Res 1541(XV), UNGAOR, 15th Sess, UN Doc A/4651 (1960) 29 at 29 (explaining that self-determination could lead to secession and the formation of a new state, association of a territory with an existing state, or integration of a territory into an already existing state). See also *Western Sahara*, Advisory Opinion, [1975] ICJ Rep 116 at 122 (Separate opinion of Dillard J, stating “It is for the people to determine the destiny of the territory”); W Ofuatey-Kodjoe, *The Principle of Self-Determination in International Law* (New York: Nellen, 1977) at 147 (stating “[t]oday, there is no doubt that self-determination, as defined in U.N. and general international practice, is a principle of international law which yields a right to self-government that can be claimed legitimately by *bona fide* dependent peoples”).
 27. See e.g. Allen Buchanan, “Theories of Secession” (1997) 26:1 Phil & Pub Aff 31 at 33; Hurst Hannum, “Rethinking Self-Determination” (1993) 34:1 Va J Int’l L 1 at 42.
 28. See *General Assembly Declaration on the Granting of Independence to Colonial Countries and People*, GA Res 1514, UNAGOR, 15th Sess, Supp No 16, UN Doc A/L.323 and Add.1-6 (1960).
 29. See *Secession Reference*, *supra* note 22 at para 123 (“the precise meaning of the term ‘people’ remains somewhat uncertain”); Marcelo G Kohen, ed, *Secession: International Law Perspectives* (Cambridge, UK: Cambridge University Press, 2006) at 1, 6-9.
 30. The doctrine of *uti possidetis* freezes existing boundaries, including those of newly independent states that were previously governed as colonies. See Stuart Elden, “Contingent Sovereignty, Territorial Integrity and the Sanctity of Borders” (2006) 26:1 SAIS Rev Int’l Aff 11 at 11-12 (describing *uti possidetis* and identifying “territorial preservation of existing boundaries” as a central tenet of the international political system).

on the map. One might also start by identifying the peoples who are being systematically disfavoured by a nation. In a sense, by choosing to disfavour a particular region—a group of people who occupy a certain territory—a state would thereby establish both the conditions and the scope of the exit right.

Importantly, in most cases, the state in which a region is currently located also has a legitimate property-type right in maintaining its current borders. This principle, too, is reflected in existing international law—most prominently in the principle of territorial integrity, which unsurprisingly often conflicts with that of self-determination.³¹ Accordingly, in the case of a well-governed state, the offering state's bid would have to be accepted both by the people of the departing region *and* by the population of the remaining portion of the state. In functional terms, we propose viewing international law as assuming an implicit bargain among the regions of a state and the central government to assist each other in thriving; they are assumed to have entered into a compact to benefit each other.³² Compacts, however, can be breached by misbehaviour by one or more sides—so much so that exit is part of the remedy. And, in some cases, it may serve everyone's interest (in the sense of Pareto superiority) to allow the dissolution of the compact.

Of course, in most countries—especially functioning democracies—would-be governments already compete with each other in the form of political parties vying to win periodic elections. That internal competition is a basic characteristic of democracy. But such competition occurs within the contours of each country's institutions, politics, and economics. There are some situations in which a particular region, because of factors such as religion, ethnicity, or wealth, either has no effective voice in this process or is not able to thrive regardless of which local political party prevails. Under the current system, the people of that region might try to emigrate to other states that are willing to have them and where they can thrive better. Immigration, though, tends to be difficult for the poor, weak, and infirm, and often breaks up families and communities. But what if the people of these regions had the option of having their new state come to them as opposed to them going to it? A market for sovereign control—for moving borders to fit people, rather than people to fit borders—would make

31. See Michael P Scharf, "Earned Sovereignty: Juridicial Underpinnings" (2003) 31:3 Denver J Int'l L & Pol'y 373 at 373 (stating that "the defining issue in international law for the 21st century is finding compromises between the principles of self-determination and the sanctity of borders").

32. Our notion of this implicit bargain among regions to help each other thrive parallels, in certain ways, the implicit relationships among regions in a nation (*e.g.*, Catalonia in Spain) described by the political theorist David Miller in his work on conceptualizing territorial rights. See David Miller, "Debatable Lands" (2014) 6:1 Int'l Theory 104 at 106-108.

this possible, thereby furthering basic democratic ideals while rewarding and incentivizing good governance.

As we have explained elsewhere,³³ the foregoing is largely but not entirely consistent with existing principles of international law. What we have described is essentially a mechanism of peaceful cession (a well-recognized principle in international law) with the addition of a requirement—approval of the transferred region—that we think better reflects current principles of international law.³⁴ We also incorporate, as described in more detail in Parts I(C), III, below, some version of remedial secession in scenarios involving oppressive governance.

B. THE CORPORATE ANALOGY

The idea of a market for sovereign control shares features with the market for corporate control,³⁵ but has some crucial differences. The similarities are straightforward. In corporate law, one of the factors that disciplines managers is the power of shareholders to get rid of them. This can occur in one of two ways: either the shareholders (citizens, in our scheme) can vote the management (domestic government) out of office, or they can sell their control rights to a different set of shareholders. The first of these options is akin to democratic accountability through the domestic political system. It is the second element—what Albert Hirschman called an exit right³⁶—that we seek to strengthen.

33. See Blocher & Gulati, “A Market for Sovereign Control,” *supra* note 6.

34. In keeping with our general notion of sovereignty belonging to the people, we equate the approval of the country with approval by its citizens.

35. For classic works on the topic see Frank H Easterbrook & Daniel R Fischel, “The Proper Role of a Target’s Management in Responding to a Tender Offer” (1981) 94:6 Harv L Rev 1161; Henry G Manne, “Mergers and the Market for Corporate Control” (1965) 73:2 J Political Economy 110. See generally Steven M Davidoff, “Takeover Theory and the Law and Economics Movement” in Claire A Hill & Brett H McDonnell, eds, *Research Handbook on the Economics of Corporate Law* (Cheltenham, UK: Edward Elgar, 2012) 216.

36. See Albert O Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (Cambridge, Mass: Harvard University Press, 1970).

TABLE 1: THE MARKETS FOR CORPORATE CONTROL AND SOVEREIGN CONTROL	
Market for Corporate Control	Market for Sovereign Control
Owners	Citizens
Managers	Governments
Shares	Citizenship
Corporate control (the power to manage)	Sovereign control (the power to govern)
Firing management	Domestic political accountability
Selling shares and corporate control	Changing citizenship and sovereign control

Table 1 compares the main features of markets for corporate and sovereign control. In our market for sovereign control, people ‘own’ the region in which they live. They decide who governs their region, not just in terms of domestic political parties, but also in terms of the state itself. Governments are therefore treated as managers rather than owners, as they would have been under traditional conceptions of international law. So long as they satisfy the wishes of their citizen-owners, they can remain in control. But if the citizenship ‘shares’ of the citizen-owners of the region are underperforming as a result of mistreatment, they can ask for bids from other states. If a particular border configuration is not working, just as if a particular firm size or structure turns out to be suboptimal, the people harmed by the existing borders should have some option to change them without international law saying borders can never (or should never) change.

The market for sovereign control would push this analogy further, for the transaction we envision would be more akin to a merger or tender offer than a sale of individual stock. Thus, both the shareholders/citizens and current manager/government would have to approve the sale. In this sense, the ownership right is partially held by the citizens of the rest of the state, since governments will seek to keep them happy as well. Refusal by the manager/government to accept an attractive offer is likely to produce political backlash. So long as the political channels within the parent state are functioning,³⁷ we can expect the interests of citizens and governments to overlap to a large degree, just as corporate management will typically approve a transaction if there is overwhelming shareholder support for it.

37. We recognize that this will not always be true, and—incorporating the logic of remedial secession—we would permit regions to exit even without the state’s approval where those channels are closed.

A key difference between the system we propose and the typical US corporate context is that, as described in more detail below, the rights of the citizens to boot out the current management would be limited to conditions where the local population is being systematically disadvantaged—either oppressed (in which case exit is free), or denied equal rights and representation (in which case exit is allowed only upon payment of compensation).

In theory, this right could be expanded beyond what international law currently recognizes to say that the region's right to demand an auction gets triggered whenever the region is able to demonstrate that the parent state is breaching its fiduciary duty to allow the population of the region to thrive. Further, to the extent other states are allowed to put in bids for this underperforming region (something international law would currently frown on as interference with territorial sovereignty), the size of those bids might be one factor that a court could consider in evaluating whether the region should be allowed to put itself on the market. Currently, though, international law does not recognize a robust fiduciary duty of sovereigns to the people, nor does it allow for sovereigns to bid for regions in other states.

Further, there is no market on which sovereign ownership interests are traded and thus can be evaluated by outsiders. A concededly imperfect proxy exists, however, in the markets for public debt. Sovereign debt is akin to stock in a corporation in that it—especially if denominated in local currency and governed by local law—can be thought of as a residual claim on assets of the sovereign.³⁸ This is because this kind of debt only gets paid at the option of the sovereign; practically, that means only if the sovereign has the expectation of large future surpluses. If a country is being mismanaged, its likelihood of default will be higher and its debt will trade at a discount. The higher the degree of mismanagement, the bigger the discount is likely to be. An outside state that thinks it can improve the management of the nation or a portion thereof can purchase the discounted debt and then, if it is able to obtain control, reap a substantial return. This is particularly so since the outside state, as part of the purchase price for control, will likely have to take over some portion of the prior state's debts.³⁹

38. See Ashoka Mody, "Sovereign Debt and its Restructuring Framework in the Euro Area" (2013) Bruegel Working Paper, online: <www.bruegel.org/2013/08/sovereign-debt-and-its-restructuring-framework-in-the-euro-area/>; Christopher A Sims, "Fiscal Consequences for Mexico of Adopting the Dollar" (2001) 33:2 J Money, Credit & Banking 597.

39. Our analogy works best if the region itself issues publicly traded debt, like Catalonia, Quebec, and Puerto Rico do.

Alternatively, a region that is seeking independence could pursue private investors via bond issuances. Purchasers of these bonds might be those who are betting on the ability of the region to produce high returns once it separates itself from its old master, but they could also be members of the region's diaspora who have other reasons to support exit.⁴⁰

Of course, countries are not corporations, and we do not seek to equate them. We note, however, that corporate law generally gives shareholders greater rights vis-à-vis their boards than international law gives citizens vis-à-vis their countries. For example, in US corporate law, the primary legal mechanism used to protect shareholders from boards' resistance to exit is a robust notion of fiduciary duties that requires the boards not only to allow, but to facilitate exit under certain conditions in which a new management can add significant value. As noted, this idea of fiduciary duties is but a nascent norm in the international law context.⁴¹

C. BAD ACTORS

The market we have described in Part I(B), above, is best suited for situations in which both the parent state and the region are well governed, and negotiations about transfers can proceed peacefully. But what about those all-too-common scenarios in which the region wants to leave not just because it sees the possibility for marginal improvement in its standard of living, but because it is being seriously oppressed?

This is a central challenge for international law. Indeed, it has been said that "the defining issue in international law for the 21st century is finding compromises between the principles of self-determination and the sanctity of

40. On diaspora bonds generally, see Anupam Chander, "Diaspora Bonds" (2001) 76 NYU L Rev 1005. Among the historical examples are the US issuance of bonds to fund the Louisiana Purchase and the issuance of bonds to the Irish diaspora to fund the independence movement. See Robert D Bush, *The Louisiana Purchase: A Global Context* (New York: Routledge, 2014); Francis M Carroll, *Money for Ireland, Finance, Diplomacy, Politics, and the First Dáil Éireann Loans, 1919-1936* (London: Praeger, 2002).

41. See United Nations Conference on Trade and Development, *Draft Principles on Promoting Responsible Sovereign Lending and Borrowing* (Geneva: 26 April 2011) (incorporating the idea that governments have some fiduciary type obligations to their citizens vis-à-vis management of their debt stocks). Also see Evan Fox-Decent, *Sovereignty's Promise: The State as Fiduciary* (Oxford: Oxford University Press, 2011).

borders.”⁴² Although it is perhaps too soon to declare it a rule of international law, the principle of self-determination has been recognized in foundational legal documents⁴³ and is thought by many to include a right of remedial secession in cases of severe oppression.⁴⁴ Along the same lines, recent years have seen growing support for the notion that the world community has a “responsibility to protect” when human rights are threatened.⁴⁵

These principles suggest that in cases of extreme oppression, a region should be able to secede freely, in order to save itself.⁴⁶ In market terms, this essentially means transferring sovereign control from the parent state to the region itself, at no cost. But what about parent states that are not engaged in the kind of genocide and extraordinary oppression that would give rise to a right of remedial secession, but are nonetheless underserving their regions in some significant way? Here, we depart from much of the literature on exits from states, in that we do not only consider the possibility of exit under conditions of extreme oppression.⁴⁷ Instead, we suggest that where a parent state has failed to provide representation

42. Scharf, *supra* note 31 at 373. See also Karen Knop, *Diversity and Self-Determination in International Law* (Cambridge, UK: Cambridge University Press, 2002); Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge, UK: Cambridge University Press, 1995) at 190; Lea Brilmayer, “Secession and Self-Determination: A Territorial Interpretation” (1991) 16:1 Yale J Int’l L 177.

43. See *supra* note 26 and the sources cited therein.

44. See Lee C Buchheit, *Secession: The Legitimacy of Self Determination* (New Haven: Yale University Press, 1978) at 220-223; T M Franck, “Postmodern Tribalism and the Right to Secession” in Catherine Brölmann, Rene Lefebvre & Marjoleine Zieck, eds, *Peoples and Minorities in International Law* (Boston: Martinus Nijhoff, 1993) 3.

45. See e.g. *2005 World Summit Outcome*, GA Res 60/1, UNGAOR, 6th Sess, Supp No 49, UN Doc A/60/1 (2005); *Report of the Secretary-General, Implementing the Responsibility To Protect*, UNGAOR, 63rd Sess, Supp No 1, UN Doc A/63/677 (2009); Cf Buchheit, *ibid*; Saira Mohamed, “Taking Stock of the Responsibility to Protect” (2012) 48 Stan J Int’l L 319 (expressing disappointment in the implementation of this responsibility); Steven R Ratner, “Land Feuds and Their Solutions: Finding International Law Beyond the Tribunal Chamber” (2006) 100:4 AJIL 808 at 811.

46. For examples of other scholars who have seen a robust right to secede as a way of protecting minority groups who are being severely oppressed and for an overview of the literature on the subject, see Allen Buchanan & David Golove, “The Philosophy of International Law” in Jules Coleman & Scott Shapiro, eds, *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press, 2004); Donald L Horowitz, “The Cracked Foundations of the Right to Secede” (2003) 14:2 J Democracy 5 (arguing, among other things, that giving an oppressed peoples the right to exit a bad situation makes them less likely to try and work things out with their oppressors).

47. See e.g. Horowitz, *ibid*.

or equal treatment to a region,⁴⁸ the state loses the right to forbid secession but remains entitled to compensation set by the market, subject to review by a third party such as the International Court of Justice (ICJ).⁴⁹ In market terms, this means that the parent state's sovereign control would be protected by a liability rule rather than a property rule.⁵⁰

Combining these scenarios with the one described, in Part I(A), above yields the three-part framework set out in Table 2.

TABLE 2: ELEMENTS OF THE MARKET FOR SOVEREIGN CONTROL			
	Category 1	Category 2	Category 3
Who 'Owns' Sovereignty	Parent state	Region	Parent state
Who Must Approve Transfer	Parent state <i>and</i> Region	Region	Region
Who Sets Price	Parent state <i>and</i> Region	Region	1. Auction; 2 ICJ (if price disputed)

48. We derive this standard from the UN Declaration, which suggests that territorial sovereignty is predicated on representativeness and equal treatment. See *Declaration on the Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, GA Res 2625, UNGAOR, 25th Sess, Supp No 18, UN Doc A/2625 (1970). The Declaration reads, “States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour” (*ibid*). See also *Secession Reference*, *supra* note 22 at paras 128-135. The court states, “[T]he international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development” (*ibid* at para 138) [emphasis added]. See also *Loizidou*, *supra* note 22. Judge Wildhaber concurring, joined by Judge Ryssdal states, “In recent years a consensus has seemed to emerge that peoples may also exercise a right to self-determination if their human rights are consistently and flagrantly violated or if they are without representation at all or are massively under-represented in an undemocratic and discriminatory way” (*ibid* at 458).

49. We use the ICJ as a possible institution. It would of course have to expand its mandate and expertise considerably to be able to tackle such matters. We are, however, more than open to suggestions as to alternate institutions that could perform the same function.

50. See generally Guido Calabresi & A Douglas Melamed, “Property Rules, Liability Rules, and Inalienability: One View of the Cathedral” (1972) 85:6 Harv L Rev 1089. Although they are not exactly voluntary from the perspective of the parent nations, we consider these liability rule transactions part of the broader market for sovereign control.

Corresponding Legal Principle	Territorial Sovereignty	Self-Determination (or Remedial Secession)	<i>Combination of Territorial Sovereignty and Self-Determination</i>
State of Governance	Good (Strong Default Rule)	Oppressive or Genocidal	<i>Denies Representation or Equal Rights</i>

Note: Italicized portions represent changes to the current system.

II. REFUGEES

The market for sovereign control described above in Part I would—we hope—help facilitate welfare-enhancing changes in sovereign control, and would reduce the incentives for states to persecute their own people. But it is not a perfect solution even to the problems it purports to address, and there are many other problems that fall entirely outside of its scope. Most notably, because the market we have described is focused on sovereign control over *territory* (albeit in a unique way), it does not speak directly to the tens of millions of people *without* sovereign territory—specifically, those displaced by persecution.

A. THE CRISIS

Consider the tragedy of the Rohingya. Facing long-standing and horrific persecution in Myanmar, where most of the Rohingya live, thousands have taken to the sea, hoping to find safety in Thailand, Malaysia, or Indonesia.⁵¹ But those countries resist paying what they see as the costs of Myanmar’s oppression.⁵² The result is that potential host states such as Malaysia adopt policies like interdiction, prevention of access, and other roadblocks that prevent refugees from arriving on their shores.

51. See “The Rohingyas: The Most Persecuted People on Earth?” *The Economist* (13 June 2015), online: <www.economist.com/news/asia/21654124-myanmars-muslim-minority-have-been-attacked-impunity-stripped-vote-and-driven>; Katrin Kuntz, “Burma’s Stateless Muslims: The World’s Most Persecuted Minority,” *Spiegel Online* (3 June 2015), online: <www.spiegel.de/international/world/an-account-of-the-flight-of-the-rohingya-minority-from-burma-a-1036589.html>.

52. See e.g. Bill Powell, “No Rest for the Rohingya of Myanmar,” *Newsweek* (25 May 2015), online: <www.newsweek.com/no-rest-rohingya-refugees-myanmar-335187>; Beh Lih Yi, “Malaysia Tells Thousands of Rohingya Refugees to ‘Go Back to Your Country’” *The Guardian* (13 May 2015), online: <www.theguardian.com/world/2015/may/13/malaysia-tells-thousands-of-rohingya-refugees-to-go-back-to-your-country>.

The Rohingya's calamity is not unique.⁵³ The number of displaced people (a category that includes but is not limited to refugees) hit a record high in 2017.⁵⁴ Those people are fleeing conflicts, poverty, famine, and persecution in Asia, Africa, the Middle East, and elsewhere. Hundreds of thousands, particularly from Syria, are currently finding their way to Europe, a fact that has, at least for the moment, increased the amount of attention given to the issue in the West. Western states are being directly confronted with the costs, political and otherwise, that have long been disproportionately borne in the Southern hemisphere. Unfortunately for the refugees, the focus in Europe seems to have turned from assisting the refugees to figuring out ways to deter them from seeking refuge there.⁵⁵

Nearly seventy years ago, another flow of refugees in Europe—those displaced by World War II—gave rise to the UN Convention that remains the basis of international refugee law.⁵⁶ The Convention is in some ways a success. It provides some clear rules and protections, especially that of *non-refoulement*,⁵⁷ and has

53. See Somini Sengupta, "60 Million People Fleeing Chaotic Lands, U.N. Says," (18 June 2015) *New York Times*, online: <www.nytimes.com/2015/06/18/world/60-million-people-fleeing-chaotic-lands-un-says.html>.

54. See Krishnadev Calamur, "A Refugee Record: The UN says 65.3 million people were displaced last year by conflict and persecution, a new high," (20 June 2016) *Atlantic*, online: <www.theatlantic.com/news/archive/2016/06/un-refugees/487775/>.

55. See e.g. "Migration Spat Mars Leaders' Bid to Revive EU," (16 September 2016) *Financial Times*, online: <www.ft.com/content/7c6555fa-7c46-11e6-b837-cb4b4333ee43> ["Migration Spat Mars Leaders' Bid to Revive EU"]; James Traub, "Europe Wishes to Inform You That the Refugee Crisis Is Over" (18 October 2016) *Foreign Policy*, online: <www.foreignpolicy.com/2016/10/18/europe-wishes-to-inform-you-that-the-refugee-crisis-is-over/>. Traub states: "From the point of view of Europe's political leaders, who must be attentive to increasingly frightened publics, the refugee crisis was above all a crisis of borders and thus of state sovereignty. It was the refugees, that is, who posed the crisis" (*ibid*).

56. *United Nations Convention relating to the Status of Refugees*, 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954 [*Convention*]). The 1951 Refugee Convention defines a refugee as a person with a "fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group, or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country" (*ibid* art 1). Also see *United Nations Protocol Relating to the Status of Refugees*, 31 January 1967, 606 UNTS 268, 19 UST 622-24. See generally James C Hathaway, "Can International Refugee Law be Made Relevant Again?" in James C Hathaway, ed, *Reconceiving International Refugee Law* (Cambridge: Kluwer Law International, 1997) xvii.

57. The right of *non-refoulement* prohibits nations from returning refugees to situations where their lives or freedom would be threatened on account of race, religion, nationality, membership of a particular social group, or political opinion. See James C Hathaway & R Alexander Neve, "Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection" (1997) 10 Harv Hum Rts J 115 at 160 (describing *non-refoulement* and calling it "[t]he most critical of all refugee rights").

improved the lives of millions of people. But those rules have shortcomings. They are hard to enforce and their scope is limited: their obligations apply only to states that refugees are able to reach, which helps explain why so many states take extraordinary measures to ensure that refugees do not reach them.

States have many reasons to turn away refugees, some of them—as brutally illustrated by many states’ resistance to taking in Syrian refugees—rooted in cultural or religious differences that some would resist calling ‘costs.’⁵⁸ But it is undeniable that accepting refugees can be costly by any definition of the term. States can be legally, or at least morally, obligated to provide basics like food and shelter. They might have to integrate refugees into public life in ways that can, as we have unfortunately seen, be quite costly to national politics. What is particularly troubling is that these costs are not evenly distributed. They are often concentrated on the states least able to bear them—those near the countries the refugees are fleeing.

We are not the first writers to notice these problems nor to suggest solutions using market mechanisms. One category of solution employs what is often called ‘burden-sharing’ among host nations. These kinds of plans have been described in detail by many scholars, the classic treatment being that by James Hathaway and Alex Neve.⁵⁹ Such plans typically involve tradeable quotas for refugees, regional planning, and payments from rich nations to poor nations to handle things like processing of refugees. A second category of market-based solutions advocates that countries of origin pay compensation to the refugees they create.⁶⁰

Neither category of proposal has seen much success. European nations were talking about burden-sharing when Hathaway, Neve, Peter Schuck and others wrote their proposals decades ago;⁶¹ those conversations continue today and face

58. See e.g. Ishaan Tharoor, “The So-Called ‘Islamic Rape of Europe’ is Part of a Long and Racist History,” *Washington Post* (18 February 2016), online: <www.washingtonpost.com/news/worldviews/wp/2016/02/18/the-so-called-islamic-rape-of-europe-is-part-of-a-long-and-racist-history/?utm_term=.d98f44e8e759>.

59. See Hathaway & Neve, *supra* note 57; Peter H Schuck, “Refugee Burden-Sharing: A Modest Proposal” (1997) 22:2 Yale J Intl L 243.

60. See e.g. Luke T Lee, “The Right to Compensation: Refugees and Countries of Asylum” (1986) 80:3 AJIL 532.

61. See Karoline Kerber, “Temporary Protection: An Assessment of the Harmonisation Policies of European Union Member States” (1997) 9:3 Int’l Refugee L 453.

the same difficulties.⁶² Compensation remains a dream for most refugees, in part because it is practically (and perhaps legally) impossible for them to claim it.

B. A MARKET-BASED SOLUTION

Building on these prior efforts, our goal is to describe a market-based solution—admittedly a partial one—to the refugee crisis.⁶³ Our hope is to decrease the costs to host states, increase the costs to oppressive countries of origin, and give refugees an asset with which to shape their own futures.

Our starting proposition is that a state violates international law when it generates refugees through persecution. There are a great many sources of international law—both treaties and custom—to support this proposition.⁶⁴ As is always the case with international human rights-type claims, national sovereignty presents something of an obstacle. But sovereignty is on both sides of the scale here: When a country creates refugees, it forces them into other countries whose sovereignty is thereby violated.

Our second proposition is that international law recognizes the legitimacy of claims to compensation against countries of origin, both by refugees and by host states. Again, the countries of origin would have a sovereignty-based defence, this one arising from sovereign immunity. But we do not think it would necessarily be an insurmountable obstacle, for at least two reasons. First, in the post-World War II era, sovereign immunity has eroded in the context of international human rights claims. Second, the notion of waiver has expanded significantly in the commercial context. Our proposal would capitalize on both of those developments and suggest that they be pushed further.

One of the central challenges—as with any remedial scheme in any legal context—are figuring out how to calculate the ‘damages,’ who should get them, and how they should be collected. We believe that damages could be calculated

62. See e.g. “Migration Spat Mars Leaders’ Bid to Revive EU,” *supra* note 55; Martin Sandbu, “Free Lunch: Horsetrading and Peacemaking,” *Financial Times* (9 May 2016), online: <www.ft.com/content/61d1be6c-1388-11e6-91da-096d89bd2173>; Nils Muiznieks, “You’re Better Than This, Europe,” *New York Times* (28 June 2015), online: <www.nytimes.com/2015/06/29/opinion/youre-better-than-this-europe.html>; James Hathaway, “Moving Beyond the Asylum Muddle” (14 September 2015) *Blog of the European Journal of International Law*, online: <<http://www.ejiltalk.org/moving-beyond-the-asylum-muddle/>>. Hathaway states, “Despite the fact that consensus on a comprehensive means to operationalize the [burden-sharing] treaty was reached, no action was taken by either the UNHCR or governments to move the project forward on the international stage” (*ibid*).

63. See also Blocher & Gulati, “Competing for Refugees,” *supra* note 7.

64. See e.g. Lee, *supra* note 60 at 536-40.

with an eye towards compensation for refugees, incentives for potential host states, and punishment for oppressive states of origin. As an initial matter, we think that the claims should be owed to *groups*, rather than to individual refugees. Persecution tends to be a group-based phenomenon, so we begin with a group-based remedy.

The key to the compensation element of our system—and what differentiates us from scholars like Luke Lee who have made related compensation proposals⁶⁵—is that we would make the claim to compensation tradeable to host states. Refugee groups would have an asset that they could use to overcome the problems of national incentives described in Part II(A), above.

The host states—the ones who accept the refugees—could then take the claim and enforce it against the country of origin. They would, for obvious reasons, be much better positioned than the refugees to collect. If the host states had existing sovereign debts with the countries of origin, they could use the claim as an offset. Or perhaps they could transfer it to one of the so-called “vulture” funds that specialize in, and have become extremely good at, pursuing sovereign debt.⁶⁶ Those funds are not always attractive characters, but this would give them a chance to play hero.

We are not so bold as to think that our idea will necessarily be adopted more easily than those that came before. Nor do we suppose that our idea is without serious potential flaws. A detailed analysis of the problems is beyond the scope of this article, but the one most relevant to the subject of this special issue—and on which we were pressed the hardest at the symposium—is the issue of commodification. We take this objection seriously. By putting a financial figure on refugee groups, perhaps we are contributing to the view of them as economic burdens rather than people. Perhaps thinking about a humanitarian crisis in monetary terms is simply a category mistake and makes a solution impossible.

We do not think that to be the case. The root of the problem we identified at the outset is that refugees are *already* commodified. Potential host states already consider the ‘costs’ and ‘burdens’ of admitting refugees, and turn them away as a result.⁶⁷ Only recently, Turkey blatantly traded away the rights of refugees seeking passage to the European Union in exchange for travel benefits for its own

65. See Lee, *supra* note 60.

66. For a discussion, see Stephen J Choi, G Mitu Gulati & Robert E Scott, “Contractual Arbitrage” (13 June 2016), online: <www.papers.ssrn.com/sol3/papers.cfm?abstract_id=2794794>.

67. See *e.g.* the discussion of the European Commission proposal that countries refusing to take in refugees be fined Euro 250,000 per refugee refused in Sandbu, *supra* note 62.

citizens.⁶⁸ In that sense, the human rights crisis *is* a debt crisis. Our hope is to give those refugees an asset—one paid for by the country that persecuted them—and, in doing so, to give other states a better reason to admit them. Moreover, we would make refugees not the objects of the market, but participants in it; they would get to decide what happens with their asset.

III. MISBEHAVING REGIONS OR MEMBER STATES

So far we have focused our attention on scenarios in which the state is the bad actor, and we have tried to design remedies for the regions or refugee groups that have been wronged. But what about the reverse scenario, in which a state wishes to expel a region or an international union wishes to expel a member state? What if—it should not be too hard to imagine—a member state in an international monetary union arguably fails to respect its obligations (think of Greece and the Eurozone). What if a region of a country becomes radicalized to the degree that it refuses to follow even the most basic legal rules in the country's constitution? Or what if a state decides that it would like to 'liberate' one of its former colonies, perhaps against the wishes of that region's residents?

A common assumption is that expulsion is simply not an option. The reasons for this are clear enough. International obligations, whether in the form of treaties or customary international law, cannot be disregarded at will. Were it otherwise, the system as a whole might collapse.

And yet international law and practice do not seem to contain explicit or well-established rules against such transfers. Cession is one of the primary legal mechanisms by which states can and do acquire territory, and it does not (at least in the traditional understanding) require anything like a plebiscite in the region being transferred.

Moreover, it is not obvious why an absolute rule against expulsion should prevail. Instead of Greece and the Eurozone, imagine that Turkey were a member of the European Union. Could the members really not expel Turkey if its government (with overwhelming popular support) decided that it wanted to deny women the right to education or abolish a free press? If, in keeping with the responsibility to protect mentioned in Part I(C), above, an international body can send troops into a country to prevent genocide, why could it not also formally dissociate itself from a country that systematically disadvantages—oppresses,

68. See Mark Yarnell, "Refugees Become Trading Chips in EU-Turkey Negotiations," (16 March 2016) *Refugees International*, online: <www.refugeesinternational.org/blog/2016/3/16/turkey>.

really—a large segment of its population? If a region can leave an oppressive or unrepresentative country, why should a country (or group of countries) not be able to do the same to a region that is misbehaving in an equivalent fashion?

These questions have not typically been asked of international law, because the paradigmatic cases throughout history have involved states *acquiring* territory, or supranational organizations growing their membership. Because states and supranational organizations are subject to very different rules and principles, scholars tend to address them separately;⁶⁹ we focus on the former in this article. For states, the drive to expand was, of course, a function of the fact that territory has long been considered valuable—so much so that the desire to expand has often been considered an inevitable characteristic of modern states.⁷⁰ There are good reasons to think that this is no longer the case, and that we have reached a point in history when control over sovereign territory is no longer the unalloyed good it once seemed—many states and international unions are better served to shrink. Borders are being pushed apart, not just pulled.

The importance of this development is difficult to overstate, and it requires a re-thinking of some rules of international law. Existing rules and prohibitions are primarily designed to avoid things like violent conquest and colonial domination; they are not necessarily well-suited to prevent other forms of harm. On the traditional understanding of international law, an involuntary acquisition would be forbidden; an involuntary cession would not be. Perhaps there is something to this asymmetry, but at the least it requires justification.

While we think involuntary expulsion should perhaps be an option in some cases, we do not think that states should be able to jettison territory at will. The bar must be high, just as it is for other border-altering scenarios like remedial secession. In fact, we think that analogous rules should apply in both scenarios. Whereas in Part II, we focused on situations in which a state treats a region

69. See Blocher & Gulati, “Forced Secessions,” *supra* note 8 (addressing expulsion from nations); Blocher, Gulati & Helfer, *supra* note 8 (addressing expulsion from international organizations).

70. See Andrew F Burghardt, “The Bases of Territorial Claims” (1973) 63:2 *Geographical Rev* 225. Burghardt states, “Virtually all states and empires have treated territory as being of itself good . . .” (*ibid* at 225). Quoting Machiavelli, Burghardt states, “[T]he wish to acquire more [territory] is admittedly a very natural and common thing; and when men succeed in this they are always praised rather than condemned” (*ibid* at 225). See also Bernard H Oxman, “The Territorial Temptation: A Siren Song at Sea” (2006) 100:4 *AJIL* 830. Oxman asserts, “The history of international law since the Peace of Westphalia is in significant measure an account of the territorial temptation” (*ibid* at 830).

poorly, our interest here is in what happens when a state is being harmed by one of its regions in an analogous—which is to say, quite serious—fashion.

By stipulation, a region does not govern a state.⁷¹ But regions can nonetheless impose serious costs on the states of which they are a part, and not all of these costs are the kinds of things a state should *prima facie* have to accept. In Coasean terms, we are envisioning the ‘costs’ of bad government as reciprocal between the region and the state—the resolution of any dispute will involve imposing costs on one or the other party. Seeing the relationship in this way leads to a three-part framework analogous to that in Table 2. This framework for involuntary expulsion of a region is set out in Table 3.

First, well-behaved regions may not be expelled, for precisely the same reason that well-governed states do not have to let their regions leave. As explained in more detail in Part I(C), above, there is a strong (if perhaps not yet official) principle in international law supporting remedial secession for regions and groups that face serious persecution. There is not necessarily any reason why a country could not invoke the same principle against one of its own regions—in fact, it would just mean that the population remedially seceding was a majority, rather than a minority.

Second, regions that blatantly disregard their legal, political, and moral obligations should be liable to expulsion in precisely the same way—and for precisely the same reason—that a region may freely secede from an oppressive or genocidal country. The level of misbehaviour necessary to trigger this right of expulsion would be high—the equivalent of the persecution and oppression that would give rise to a right of remedial secession.

Finally, we suggest the creation of a middle category in which the region’s misbehaviour does not rise to the level of oppression or persecution. In this category, a region that is significantly underperforming or falling short on its obligations, but not committing violations on the level of persecution or oppression, can be expelled—but not for free. As with the paid-secession examples in Part I(C), above, compensation will be owed.

71. There are situations, of course, in which a regional or minority group will command power at the national level. Where that is the case, the rules we describe in Part I would apply.

TABLE 3: ELEMENTS OF THE EXPULSION FRAMEWORK

	Category 1	Category 2	Category 3
Who ‘Owns’ Sovereignty	Parent state	Parent state	Region
Who Must Approve	Parent state and Region	Parent state	Parent state
Who Sets Price	Parent state and Region	Parent state	1. Auction; 2 ICJ (if price disputed)
Corresponding Legal Principle	Territorial Sovereignty	Self-Determination (or Remedial Secession)	Combination of Territorial Sovereignty and Self-Determination
State of Governance in Region	Good (Strong Default Rule)	Oppressive or Genocidal	Denies Representation or Equal Rights

IV. CONCLUSION: WHAT MARKETS TELL US ABOUT SOVEREIGNTY, AND VICE VERSA

In this article, we have explored the relationship between markets and governance, finding that each shows us something important about the other.

As to markets, there are scenarios in which, bounded by proper rules, a market-style approach can help solve serious problems of sovereign control. We are not insensitive to the many potential problems with markets and address them in detail elsewhere,⁷² but as a general matter, we do not think that they are intractable enough to write off the idea entirely.

In addition, these market-style reforms are largely consistent with existing international law—at least as viewed through a progressive lens. Existing law can, for example, accommodate both burden-sharing among nations with regard to refugees, and the payment of compensation to refugees. We have admittedly suggested some alterations to the framework, such as a requirement of regional approval for cessions in well-governed countries, a mechanism for paid secession in countries that deny representation and equal rights, and a system of tradeable claims for refugees.

72. See Blocher & Gulati, “A Market for Sovereign Control,” *supra* note 6 at Part III (addressing risks of war, colonialism, anti-democracy, and impossibility).

But these changes are not written on a blank slate. We think that support for them can be found within international law. The principles of self-determination and remedial secession, the responsibility to protect, and the nascent norm of fiduciary duty all point in the direction of a world in which territorial sovereignty must be made to accommodate, or at least exist alongside, a variety of other important legal principles.

In addition to what our proposals indicate about markets, there are lessons to be learned for sovereignty itself. First, sovereignty is alienable. There is nothing radical in making this assertion. Sovereign control has been ceded, traded, gifted, leased, and otherwise transferred between states for generations and is the subject of well-established international law rules. What we have tried to do is emphasize ways in which people can have direct control over such transfers—not simply by moving across borders (after all, every migrant and refugee has, at least for him- or herself, effected a change in sovereign control), but by moving the borders themselves. As for countries, we have emphasized ways in which sovereignty should sometimes be involuntarily alienable: When states or regions violate their basic legal, moral, and political obligations, they thereby lose the benefit of sovereignty.

Second, and to return to the Radin passage with which we began, sovereignty can be thought of as market alienable. There is a long history of ‘sovereignty sales,’ from compensated cessions of territory, to long-term leases, to the economic considerations that shape contemporary immigration and refugee policy. This may not mollify critics who oppose our proposals on commodification grounds, but it should remind them that the ship has already left port.

Third, we have described a market-based framework in which *people*, not states, are the primary ‘owners’ of sovereignty. The traditional conception of sovereignty gives states control over sovereignty, but there is nothing essential about that idea.

Traditional attacks on sovereignty—exemplified by the battles to establish a robust and enforceable system of international human rights law—have tried to minimize and overcome sovereignty. Our approach is different. We do not seek to destroy sovereignty, but to take it and put it in the hands of the people themselves. What we have described is not just a market for sovereign control, but popular sovereignty on a global scale.